NYLEX (M) SDN. BHD.

v.

ALIAS CHEK

HIGH COURT MALAYA, KUALA LUMPUR
HARUN HASHIM J
[ORIGINATING MOTION NO. A40 OF 1984]
19 JANUARY 1985

LABOUR LAW: *Termination of service of employee for misconduct - After domestic enquiry - Assistant Director of Labour held enquiry - Under s. 69(1) Employment Act - Whether Director General has jurisdiction to hold enquiry.*

CIVIL PROCEDURE: *Appeal to High Court by Originating Motion - Under s. 77 Employment Act - Appeal to be lodged within 14 days - Originating Motion filed out of time - Whether Court can exercise inherent power to hear appeal.*

This is an appeal from the decision of the Assistant Director of Labour, Klang, whereby the applicant was ordered to pay the sum of RM4,634.80 being "indemnity *in lieu* of notice and termination benefits".

The respondent was an employee of the applicant and was dismissed from service for misconduct after a domestic enquiry. The respondent complained to the labour officer that his services were terminated without notice and claimed indemnity *in lieu* of notice and termination benefits.

An enquiry was held under s. 69(1) of the Employment Act 1955. At the enquiry the respondents claimed that the allegations against him were not true. The applicant contended that (a) the Assistant Director had no jurisdiction to hold the enquiry under s. 69(1) and (b) in any event the respondent had been dismissed for misconduct and he is not entitled to termination benefits.

The Assistant Director disagreed and held that under s. 69(1) he had power to enquire into and decide any dispute between an employee and his employer arising out of any term of the contract of service or out of the provisions of the Act or any regulation made thereunder. He also held that for the applicant to succeed on the second ground he must prove misconduct.

Held:

[1] The power of the Director General (including the Assistant Director) under s. 69 is limited to matters concerning **wages** only. The words "any dispute" in the section must be read conjunctively with the words "to pay any wages due".

[2] Dismissal under s. 14(1)(a) had been purposely left out of s. 69(3). Therefore on realising that there was a dispute between the parties regarding dismissal the Assistant Director should have ceased to deal with the matter.

[3] As regards the application being out of time under s. 77 of the Employment Act, the Court decided to exercise its inherent powers under O. 92 r. 4 of the Rules of the High Court 1980 to prevent an injustice in spite of the decision in *Syarikat Maltaco Sdn. Bhd. v. Eow Teh Yu & 3 Ors.* where it was held that an appeal under s. 77 of the Employment Act 1955 must be brought within 14 days.

[Appeal allowed with costs. Order of Assistant Director set aside.]

Case referred to:
Syarikat Maltaco Sdn. Bhd v. Eow Teh Yu & 3 Ors.(O.M. No. A14/81)

Legislation referred to:
Rules of the High Court 1980, O. 92 r. 4
Employment Act 1955, ss. 14, 69, (1), 77
Industrial Relations Act 1967, ss. 2, 18, 20, 26

For the applicant - Dennis Xavier; M/s. Dennis Xavier & Co.
For the respondent - Baharuddeen Abu Bakar; M/s. Baharuddeen & Co.

JUDGMENT

Harun Hashim J:

This is an appeal from the decision of the Assistant Director of Labour, Klang made on **19 July 1984** whereby the applicant was ordered to pay the sum of RM4,634.80 "being indemnity *in lieu* of notice and termination benefits" to the respondent.

The Originating Motion was filed on **20 August 1984**. On a preliminary objection, Mr. Baharuddeen, on behalf of the respondent, contends that as the Originating Motion was filed out of time and there has been no application to extend the time or account for the delay, the Court has no jurisdiction to hear the appeal. A similar situation arose in *Syarikat Maltaco Sdn. Bhd. v. Eow Teh Yu & 3 Ors.* (O.M. No. A14/81) wherein I held that the period within which an appeal under s. 77 of **the Employment Ordinance**, 1955 should be brought is **14 days.** The Employment Ordinance, 1955 was **revised** in 1981 and is now known as the Employment Act, 1955 which came into force on 18 February 1982. There has been no change to s. 77 and I therefore hold that the decision in *Maltaco's* Case applies to this case.

The applicant is clearly out of time and this appeal, in the normal course, should be dismissed on that ground. But this case presents another difficulty. Mr. Xavier, on behalf of the applicant, contends that the Assistant Director of Labour had no jurisdiction to make the order in the first place and therefore the order is bad and should not be allowed to stand. It is necessary therefore to determine whether Mr. Xavier is right in his contention so as to prevent an injustice which may be occasioned by a procedural technicality.

The respondent was an employee of the applicant for 11 years. On 23 April 1982 he was suspended from duty pending a domestic inquiry into 5 charges of misconduct. The domestic inquiry was held on 26 April 1982 in the presence of 5 trade union representatives. He was found guilty of 4 charges and dismissed from the service for misconduct with effect from 24 April 1982. The respondent then complained to the Labour Officer at Klang on 30 July 1982 that his services had been terminated by the applicant without notice and claimed indemnity in lieu of notice and termination benefits. After several postponements, the complaint was finally heard by the Assistant Director of Labour on 5 July 1984.

The inquiry before the Assistant Director was held under s. 69(1) of the Employment Act, 1955. Section 69 (in so far as it is relevant to this case) reads-

> (1) The Director General may inquire into and decide any dispute between an employee and his employer or between an employee and any person liable under this Act, or any regulations, order or other subsidiary legislation whatsoever made thereunder to pay any wages to such employee where such dispute arises out of any term in the contract of service between such employee and his employer or out of any of the provisions of this Act, or any regulations, order or other subsidiary legislation whatsoever made thereunder, and in pursuance of such decision may make an order in the prescribed form for the payment by either party of such sum of money as he deems just without limitation of the amount thereof.

(2) The powers of the Director General under subsection (1) shall include the power to hear and decide, in accordance with the procedure laid down in this Part, any claim by a sub-contractor for labour against a contractor or sub-contractor for any sum which the sub-contractor for labour claims to be due to him in respect of any labour provided by him under his contract with the contractor or sub-contractor and to make such consequential orders as may be necessary to give effect to his decision.

(3) In addition to the powers conferred by subsection (1) and (2), the Director General may inquire into and confirm or set aside any decision made by an employer to down-grade or suspend an employee under s. 14 and the Director General may make such consequential orders as may be necessary to give effect to his decision:

Provided that the Director General shall not exercise the power conferred by this subsection unless the employee has made a complaint to him under the provisions of this Part within thirty days from the date on which the decision to down-grade or suspend him under s. 14 is communicated to him either orally or in writing by his employer.

(4) -

At the inquiry, the respondent said that he had been dismissed for misconduct but claimed that the allegations against him are not true. The applicant contended that:

(a) The Assistant Director had no jurisdiction to hold the inquiry under s. 69(1); and

(b) In any event, as the respondent had been dismissed for misconduct, he is not entitled to termination benefits.

The Assistant Director did not agree. He held that under s. 69(1), he had the power to inquire into and decide **any dispute** between an employee and his employer arising out of any term in the contract of service between them or out of the provisions of the Act or any regulation made thereunder. He also held that for the Applicant to succeed on the second ground, it must **prove** the misconduct.

Powers of Director-General under section 69

In my opinion, the powers of the Director-General (including an Assistant Director) under s. 69(1) are limited to matters concerning **wages** only. This is made plain by the sub-section itself if it is read (as it should be) as follows:

> The Director-General may inquire into and decide **any dispute** between an employee and his employer ... **to pay any wages due to such employee** where **such dispute arises** out of any term in the contract of service between such employee and his employer ... and in pursuance of such decision make an order ... for the payment by either party of such **sum of money** as he deems just without limitation of the amount thereof.

The words "any dispute" must be read conjunctively with the words "to pay any wages due". That this is so is further emphasised by the words "to **such** employee" and "where **such** dispute" that follow. And finally, the only order that may be made is the payment of **money.** This limited type of order will therefore only arise if the dispute concerns the payment of money or more particularly **wages**. I am fortified in my view by the other provisions of s. 69. In subsection (2) the power is extended to claims for money for providing labour by a sub-contractor payable by a contractor. In subsection (3) additional powers are conferred on the Director-General with regard to **disputes** concerning **down-grading** or **suspension** of an employee under s. 14 which reads-

(1) An employer may, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry:

(a) dismiss without notice the employee;

(b) downgrade the employee; or

(c) suspend him from work without payment of wages for a period not exceeding one week.

(2) -

(3) -

It will be observed that **dismissal** under s. 14(1)(a) has been purposely left out in s. 69(3). If the legislature had intended to include disputes concerning dismissals, it need only say-

any decision made by an employer under s. 14.

Proof of Misconduct

In his grounds of decision dated 14 December 1984, the Assistant Director said:

I agree with the reasoning in the defendant's second ground for disputing liability. An employee who has committed misconduct inconsistent with the fulfilment of the conditions of his service is not entitled to termination benefits. However misconduct must be proved. The defendant cannot expect me to accept his statement without substantiation.

Yet at the commencement of his grounds, the Assistant Director said:

The complainant alleged that he had been dismissed by the defendant on various allegations of misconduct which he says are not true, and therefore had filed this claim.

It should have been clear to the Assistant Director at the outset that there was here a dispute between the parties regarding the dismissal and he should have ceased to deal with the matter then and there. This does not mean that an aggrieved dismissed employee is without remedy-

(a) If he is a member of a trade union, the dismissal becomes a **trade dispute** within the meaning of s. 2 of the Industrial Relations Act, 1967 and may be dealt with under s. 18 (and if necessary) under s. 26 of that Act.

(b) If he is not a member of a trade union, he could make a representation to be **reinstated** in his former employment under s. 20 of the Industrial Relations Act, 1967.

To ask for proof of misconduct in the instant case is tantamount to the Assistant Director of Labour usurping the functions of the Director-General of Industrial Relations, the Minister of Labour and finally that of the Industrial Court because the employer will have to produce evidence of the misconduct and the Assistant Director will have to decide whether if misconduct is proved, such misconduct merits dismissal. That this is what the Assistant Director attempted to do in this case is evident from his grounds when he said:

The fact that the complainant pleaded guilty to 4 of the charges by itself does not make him guilty of misconduct inconsistent with the fulfilment of the conditions of his service. He could have been charged for some frivolous offence totally unrelated to his contract of service.

For the reasons stated, I hold that the Assistant Director had no jurisdiction to hold the inquiry under s. 69(1) of the Employment Act in the circumstances of this case. His order against the Applicant therefore should not be allowed to stand.

Order 92 r. 4 of the Rules of the High Court, 1980 provides that this Court may exercise its inherent powers to make any order as may be necessary to prevent an injustice. In my view, it will be an injustice to make the applicant in this case pay the amount ordered by the Assistant Director merely because the applicant is out of time in filing this appeal. I accordingly allow the appeal with costs. The order of the Assistant Director is set aside.

Also found at [1985] 1 CLJ 185